CHAPTER TWENTY-THREE

FEDERAL POWERS, TYLER, AND THE GIRARD WILL CASE

1842–1844

Two phases of the delicate issue of slavery having been passed upon at its session in the first year of the new Whig Administration of Harrison and Tyler, still another phase of this question was presented at the 1842 Term. Now for the first time in its history the Court's attitude in this connection became the subject of attack, after its decision in *Prigg* v. *Pennsylvania*, 16 Pet. 539, in which the constitutionality of the Pennsylvania statute relative to fugitive slaves was involved.[1] The increasing tension in the community over the issue of the respective powers of the States and of Congress as to such slaves was clearly shown at the argument. A denial of the right of the State to legislate on this subject, said the Attorney-General of Pennsylvania, will "arouse a spirit of discord and resistance that will neither shrink nor slumber till the obligation itself be cancelled or the Union which creates it be dissolved"; and another of the State's counsel said that of all solemn questions ever argued before this

[1] Owing to the illness of the Chief Justice, Judge Story presided during most of the 1842 Term. His situation, Story amusingly described in a talk with one of his classes at the Harvard Law School, as follows: "Was Tyler President or Acting President at the demise of Gen. Harrison? A nice question, gentlemen, and hard to solve. The question was debated in cabinet meeting, and on Mr. Webster's opinion, Tyler was addressed as President. On one occasion, when Chief Justice Taney was ill, I took his place as Chief Justice and was thus addressed. At first, I felt nervous, but soon becoming used to it, found it, like public money to new members of Congress, '*not bad to take.*' And this was probably the feeling with Mr. Tyler." *Western Law Journ.* (1846), II, 432; *Story*, II, 506.

Court "no one has arisen of more commanding import, or wider scope in its influence, or on which hung mightier results for good or ill to the Nation"; and he stated that it involved "a subject which is even now heaving the political tides of the country, which has caused enthusiasm to throw her lighted torch into the temples of religion, and the halls of science and learning, while the forum of justice, and the village barroom have equally resounded with the discussion. . . . Whilst it has become 'sore as gangrene' in one region, it is the football of the enthusiast in another." That the Court itself fully realized the seriousness of the situation was shown in the opening words of its opinion, delivered by Judge Story: "Few questions which have ever come before this Court involve more delicate and important considerations, and few upon which the public at large may be presumed to feel a more profound and pervading interest." Fortunately, the Court found itself able to deliver a unanimous opinion, holding that the power of Congress over the subject of fugitive slaves was exclusive, and that the State statute, being in conflict with the Federal Fugitive Slave Law, was consequently unconstitutional. But while all agreed that a State statute could not interfere with the provisions of the Federal law, there was a sharp dissent by Chief Justice Taney and Judges Thompson and Daniel from the further proposition laid down by Judge Story (and concurred in by the majority of the Court, including the Southern Judge, Wayne) to the effect that the power of Congress was so exclusive as to render invalid every State statute on the subject, whether in aid of, or in conflict with, the Federal law. The decision was equally unsatisfactory to both pro-slavery and anti-slavery men. The former regarded it as a severe blow to State-

Rights, even though it sustained their views on the slavery question.[1] Among the latter, the decision was regarded as a complete surrender to the South. John Quincy Adams wrote in his diary, March 10, that he had spent much of the day in reading the various opinions delivered by the seven Judges, "everyone of them dissenting from the reasoning of all the rest, and everyone of them coming to the same conclusion, the transcendent omnipotence of slavery in these United States, riveted by a clause in the Constitution." For his part in the "ignoble compliance with the slaveholders' will", Judge Story was hotly assailed at the North; but such criticism could not perturb a Judge who had penned to a friend the following noble words: "I shall never hesitate to do my duty as a Judge under the Constitution and laws of the United States, be the consequences what they may. That Constitution I have sworn to support, and I cannot forget or repudiate my solemn obligations at pleasure. You know full well that I have ever been opposed to slavery. But I take my standard of duty as a Judge from the Constitution."[2] To the State of New York, the *Prigg Case* decision gave particular offense; for it completely nullified a law of that State which, by granting jury trials in case of the arrest of fugitive slaves, had heretofore resulted in rendering utterly nugatory the provisions of the Federal Fugitive Slave Law, and which had very naturally caused great friction between New York and Southern States. "Thus ends the controversy between New York and Virginia, and between New York

[1] In a strongly adverse review of Judge Story's life in the *New York Evening Post*, Jan. 27, 1852, it was said: "The Supreme Court has never struck a more decisive and fatal blow at State-Rights than in this decision, and there is no one of Judge Story's honors of which he has less reason to be proud than that of being selected to deliver the opinion of the Bench."

[2] *Story*, II, 430, letter of Story to E. Bacon, relating to the case of *La Belle Eugénie*.

and Georgia," said a leading New York paper. "The conclusion to which the Court have arrived involves consequences which can by no means be satisfactory to this part of the country. A freeman now may be arrested and carried into slavery, after but a slight investigation before a magistrate and without the intervention of a jury. The (Federal) Law of 1793, the practice under which New York and Pennsylvania endeavored to correct, is now pronounced to be supreme law." [1]

Since, however, public attention, at this date was absorbed in the bitter contests over the Sub-Treasury, the Banks, the Texas and the Oregon questions and the struggle between President Tyler and the Whigs, the slavery issue, for the time being, became subordinate; the excitement over the *Prigg Case* died away; and the *North American Review*, the very next year, in speaking of "the beneficial action of the Judiciary in quieting public contests and maintaining unruffled the majesty of the law", referred to the effect of the *Prigg Case* as follows: "At this majestic bar, the matter was argued with as much dignity and calmness as if it has never set the country in a flame; and the judgment was received by the public with the quiet submission which they usually manifest when ordinary judicial decisions are announced. Some murmurs were heard from both parties about the insufficiency or hardship of certain provisions in the Constitution. We hardly heard a whisper against the fidelity and even-handed justice with which that judgment had been expounded by the Court." [2]

[1] *New York Daily Express*, March 8, 1842.

[2] *The Independence of the Judiciary*, in *North Amer. Rev.* (Oct. 1843), LVII; and see Crawford, J., *In re Booth* (1859), 3 Wisc. 79, for the view taken of the *Prigg Case* by contemporaneous opinion; see also article in *New York American*, quoted in *New York Express*, March 5, 1842. The case was discussed on many occasions in Congress during the next seven years. See especially *30th Cong., 1st Sess.*, speeches of Ashmun of Massachusetts, April 10, 1848, Bayly of Virginia and McLane

Undoubtedly, the chief reason for the equanimity with which the decision was finally accepted was the rapid realization by the Northern States of the effective weapon which had been placed in their hands. Those portions of Judge Story's opinion which declared that the States were prohibited not only from passing laws in violation of the fugitive slave provision of the Constitution, but from enacting legislation in furtherance of it, and that the States were not bound and could not be obliged to enforce this provision of the Constitution through State officers, were seized upon by anti-slavery States as a justification for legislative measures refusing the assistance of their officials to enforce the Federal Fugitive Slave Law.[1] Relying on this theory, Massachusetts, as early as 1843, passed a statute which made it a penal offense for any State officer or constable to aid in any way in carrying the Federal Law into effect. Other States soon followed with similar legislation;[2] and the difficulty of reclaiming a fugitive slave became so great as to force Congress to enact new and more stringent Federal legislation, in 1850, and thus to precipitate the great conflict between State and Federal authority which finally led to war.[3]

of Maryland, April 11, 1848; *30th Cong., 2d Sess.*, speech of Baldwin of Connecticut, Jan. 22, 1849, Crisfield of Maryland, Feb. 17, 1849.

[1] Story himself believed that "a great point had been gained for liberty — so great a point, indeed, that on his return from Washington," wrote his son: "He repeatedly and earnestly spoke of it to his family and his intimate friends as being 'a triumph of freedom.'" *Story*, II, 392, 394.

[2] Personal Liberty Laws (so called) similar to that of Massachusetts, were enacted in Vermont in 1843, Connecticut in 1844, New Hampshire in 1846, Pennsylvania in 1847, Rhode Island in 1848, Wisconsin in 1857. On the other hand, South Carolina, Mississippi and Missouri passed laws prohibiting free negroes from entering their boundaries. For one of the best summaries of the Personal Liberty Laws, see *National Intelligencer*, Dec. 11, 12, 1860.

[3] Slavery was further involved at this 1842 Term in a singular case, *Gordon* v. *Longest*, 16 Pet. 97. In this suit, argued by John J. Crittenden against Thomas H. Benton, and involving a Kentucky statute forbidding steamboats to take on board slaves from the Ohio shore, Judge McLean in his opinion said: "This is the first instance known to us in which a State Court has refused to a party a right to remove his cause to the Circuit Court of the United States."

While the Court, composed of a majority of State-Rights Democrats, had thus upheld the exclusiveness of Federal power in relation to the limited subject of fugitive slaves, it took an even greater step at this Term in expanding the domain of Federal power with relation to a great variety of subjects. For in *Swift* v. *Tyson*, 16 Pet. 1, it announced for the first time that the Federal Courts had the authority to lay down principles of general law, without regard to the decision of State Courts, even where no question of the Federal Constitution or laws was involved. Marshall himself had never asserted such power for the Court; and theretofore it had been commonly assumed (and there had been loose expressions of the Court to the effect) that the Thirty-Fourth Section of the Judiciary Act which provided "that the laws of the several States . . . shall be regarded as rules of decision in trials at common law" in the Federal Courts, included within the scope of the meaning of the word "laws", the decisions of the local State Courts as well as statutory laws.[1] Now, in 1842, in this case of *Swift* v. *Tyson* the question arose whether the Court would hold itself bound to follow the doctrine laid down by the Courts of New York relative to the law of bills of exchange. The case had been previously argued, in 1840, by Daniel Webster against Richard H. Dana of Massachusetts, and was now submitted on briefs by William P. Fessenden of Maine and by Dana. Judge Story held (without noticing any expression to the contrary in previous decisions of the Court) that this Section of the Judiciary Act did not apply to "questions of a more general nature not at all dependent upon local statutes or usages of a fixed and per-

[1] In *Bank of Kentucky* v. *Wister*, 2 Pet. 318, 324, however, as late as 1829, the Court had said that it was "unnecessary at this time to enter into the inquiry how far its decisions and those of other States upon a question of a general, not a local case or character, are to be controlled by those of any particular State."

manent operation"; that as to such questions, the Federal Courts were not to be bound by the law of the States as laid down by the State Courts; that the interpretation and effect of contracts and other instruments of a commercial nature, were to be sought "in the general principles and doctrines of commercial jurisprudence"; and that in this case, the Court would not follow the law as to negotiable instruments laid down by the New York Courts, but would ascertain the law for itself. This decision, which, as the newspapers said, "settled an important commercial question which ought to be soon and generally known", introduced a novel and original doctrine into Federal law — that there existed in the United States a general commercial law independent of the decisions of a State.[1] Probably no decision of the Court has ever given rise to more uncertainty as to legal rights; and though doubtless intended to promote uniformity in the operation of business transactions, its chief effect has been to render it difficult for business men to know in advance to what particular topic the Court would apply the doctrine; and the adverse criticisms by Judges and jurists, which have continued to the present day, have had much justification.[2] In another famous case at this Term, *Martin* v. *Waddell's Lessee*,

[1] In the *Western Law Journ.* (April, 1844), the editor expressed a hope that Judge Story would prepare a bill "founded on the power of Congress to regulate commerce, which might have the effect of rendering the law of commerce as well as of navigation uniform throughout this country. Think, for example, of the evils arising from the conflicting doctrines as held in different States on the subject of negotiable paper and insurance." See also review in *Law Reporter* (1842), V.

[2] *Is there a General Commercial Law*, by Robert G. Street, *Amer. Law Reg.* (1873), XXI; *Federal Common Law*, by Hunsdon Cary, *Virg. Law Reg.* (1904), X; *Common Law Jurisdiction of the United States*, by Alton B. Parker, *Yale Law Journ.* (1904), XVII; *The Non-Federal Law Administered in Federal Courts*, by W. Trickett, *Amer. Law Rev.* (1906), XLI. See also comments on Judge Story and his decision in this case by John C. Gray in *The Nature and Sources of the Law* (1909); see also especially Field, J., in *Baltimore & Ohio R. R.* v. *Baugh* (1892), 149 U. S. 368, 401.

16 Pet. 367, the Court still further limited its obligation to follow the law of the State under the Thirty-Fourth Section of the Judiciary Act. This case involved the right of the State of New Jersey to grant exclusive oyster-bed rights in flats under its tide-waters, a question which had "created much ill-blood in the past twenty years." The Court was called upon to construe certain royal charters and deeds of surrender by the Colonial Proprietors, which had already been construed and the legal question presented by which had been decided by the New Jersey Supreme Court, as early as 1818. While deciding in favor of the State, the Court, through Judge Taney, held that as the question did not depend "upon the meaning of instruments framed by the people of New Jersey or by their authority", the State Court ruling did not bind the Federal Court, though it was "unquestionably entitled to great weight." "The very learned and lucid opinion of Taney will give as much satisfaction to the lovers of law as the decision gives to the people of New Jersey," said a New York paper. "It will increase the general confidence in the uprightness and legal capability of this truly august tribunal." [1] One other instance of the scrupulous zeal with which this Democratic Court adhered to its determination to protect the functions of the Federal Government against encroachment by the States was seen in *Dobbins* v. *Erie County*, 16 Pet. 435. In this case, a statute of Pennsylvania imposing a tax on the income of a Federal revenue officer was held unconstitutional as an "interference with the constitutional means which have been legislated by the government of the United States to carry into effect its powers to lay and collect taxes, duties, imports, etc., and to regulate commerce", and as diminishing the recompense

[1] *New York Journal of Commerce*, quoted in *Boston Daily Advertiser*, Feb. 14, 1842.

secured to the Federal officer by Federal laws. The decision, rendered through a Southern Judge, Wayne, reaffirming and applying the doctrines of *McCulloch* v. *Maryland*, met with criticism from State-Rights Democrats. "This appears to be a carrying of the doctrine of National Sovereignty very far," said the *Pennsylvanian*. "When the tax is laid on all persons indiscriminately who receive official salaries, on State officers as well as National, there appears no danger of the action of the National Government being impeded by the tax. . . . It is a natural weakness of the human mind for the officers of every government and every branch of government to be prone to stretch the powers of their own government or department and to abridge those of others. Hence, there has been generally a disposition in the Courts of the United States to encroach somewhat on the rights of the States as understood by the Democratic party. We do not undertake to pronounce that the decision is erroneous, but we should have been well pleased, had the Constitution been framed or the Judges so construed it, that no such decision should have been made."[1]

The stand taken by the Court, composed chiefly of Democratic Judges, in support of the powers of the Federal Government was the more marked, by reason of the fact that during the past two years, 1841 and 1842, the Democratic Party in Congress and throughout the country had been peculiarly violent in assailing the extension of Federal power contained in the Whig legislation of these years. The Whig Congress, as soon as it convened after the death of President Harrison and the accession of John Tyler to the Presidency, had passed a series of statutes, each of which had been charged by the Democrats to be violative of the sovereignty

[1] *Pennsylvanian*, April 21, 1842.

of the States—the Fiscal Bank Acts, the National Bankruptcy Act, the Habeas Corpus Act and the Congressional District Election Act. As the debates on these measures produced the first criticisms which had been made upon the Court and its functions since the year 1833, and as the discussion of the effect of the Court's position in constitutional Government was conducted with masterful ability, these debates deserve the attention of all students of American legal history.

As to the Fiscal Bank Acts, the discussion naturally centered about the power of Congress to charter a National Bank; and this much-argued question, which had been the source of party conflict since 1789 and which had been supposed to have been settled by the decisions of the Court in *McCulloch* v. *Maryland* and *Osborn* v. *Bank of the United States*, twenty-two and seventeen years before, was now reargued with increased fervor. The views which Jefferson, Jackson and Calhoun had advanced, as to the non-binding force of Court decisions upon the President or the Congress, when acting in Executive or Legislative capacity, were now reasserted by the Democrats with great vigor. "A Senator must exercise his own judgment as a legislator on the question of the constitutional power of Congress to charter a Bank," said James Buchanan of Pennsylvania: "I respect judicial decisions within their appropriate sphere, as much as any Senator. They put at rest forever the controversy immediately before the Court; and as a general rule they govern all future cases of the same character; but even these decisions, like all other human things, are modified and changed by the experience of time and the lights of knowledge. The law is not now what it was fifty years ago, nor what it will be fifty years hereafter. . . . But even if the Judiciary had settled the question, I should never hold

myself bound by their decision, whilst acting in a legislative character. . . . I cannot agree that 'its judicial expositions are of equal authority with the text of the Constitution.' This is an infallibility which was never before claimed for any human tribunal. . . . No man holds in higher estimation than I do the memory of Chief Justice Marshall; but I should never have consented to make even him the final arbiter between the Government and people of this country on questions of constitutional liberty. . . . It is notorious that the Court, during the whole period which he presided over it, embracing so many years of its existence, has inclined towards the highest assertion of Federal power. That this has been done honestly and conscientiously I entertain not a doubt." [1] Similar views were expressed in the House by John T. Mason of Maryland, who, though the youngest Congressman, voiced the old fears of Federalism: "The Court is not authorized to interfere with the free exercise by Congress of its constitutional functions. While I have the highest veneration for the ability and purity of the late Chief Justice, yet I would be unwilling that upon this question his opinions should govern my judgment, for the plain reason that his prejudices, his partialities, his interests and his education, all contributed to the formation of an opinion which should be entirely free from the bias of either."

On the other hand, the binding force of the decision of the Court in *McCulloch* v. *Maryland*, even upon Congress, was supported by many strong lawyers, both Democratic and Whig — such as Senator John M.

[1] *27th Cong., 1st Sess.*, and *App.*, 161, 298, speeches of Buchanan, July 7, 1841, Israel Smith of Connecticut, July 20, 1841, Levi Woodbury of New Hampshire, July 10, 1841; speeches in the House, of John T. Mason of Maryland, Aug. 3, 1841, Ezra Dean of Ohio, Aug. 5, 1841, John Hastings of Ohio, Aug. 9, 1841, Henry A. Wise of Virginia, Aug. 5, 1841.

Berrien of Georgia (who had been Attorney-General under President Jackson), and Henry Clay of Kentucky, Jabez W. Huntington of Connecticut and James Simmons of Rhode Island. "The Supreme Court have repeatedly and unanimously decided that Congress have the constitutional power to establish a National Bank and this is the only constitutional mode of determining the question," said Simmons. "The decisions have been uniform, always recognized and submitted to by every State Court, by every State Government, and by the whole people. If after this, men will contend that it is an open question, a doubtful question, they by it insist that no question can be settled under our Constitution." [1] And Berrien eloquently protested against "that political heresy of the most alarming character . . . that the interpretation of the Constitution by its own appointed arbiter is not obligatory on any man who is called, in the discharge of his official duty, to interpret that instrument, but that he is at liberty to follow out implicitly the dictates of his own understanding uncontrolled by that decision. . . . To the judicial power belongs, by the express provisions of the Constitution itself, in all cases properly brought before it, the right to interpret that instrument, to decide what it permits and what it forbids: in fine, to determine what it is. Each judicial decision, so made under the authority of the Constitution, becomes incorporated in, and is part and parcel of, the instrument itself, enlarging, restraining or modifying the original text, according to the legal import and effect of such decision. He who disregards it, whether he be legislator or executive officer, disregards

[1] *27th Cong., 1st Sess.*, and *App.*, 358, speeches of Berrien, Sept. 1, 1841, Archer of Virginia, Sept. 2, Huntington, July 3; speeches in the House of Clay, July 1, Simmons, July 2; *27th Cong., 2d Sess.*, speech of Berrien, Jan. 26, 1842; see, however, vigorous denial of Berrien's doctrine by Israel Smith of Connecticut, Jan. 23, 1842.

the Constitution itself, of which it is a part and confessedly of higher authority than the original text, since in all cases of supposed conflict it controls that text."[1] While thus maintaining that in their legislative capacity, they were not bound by Court decisions, the Democratic Senators advanced further a view of the effect of the decision in the *McCulloch Case*, which was more tenable, and consideration of which has been sometimes lost sight of by Judges and jurists. "That decision," said Buchanan, "amounted only to this, that the Court would not rejudge the discretion of Congress, but it necessarily referred the constitutional question back to the conscience of each member about to vote for or against a new Bank, untrammelled by any judicial exposition."[2] All that the Court decided was that Congress, in 1816, in determining that a National Bank was a necessary and proper means of executing certain express powers of the Constitution, was acting then within its powers; but the question whether a Bank was such a necessary and proper means was for the exclusive determination of Congress in the first instance; hence, each successive Congress had full and untrammeled power so to determine. And as Senator Levi Woodbury of New Hampshire said: "The decision of the Supreme

[1] Berrien also urged further an interesting argument to the effect that the State-Rights advocates ought not to reject this principle for they were insistent that the Supreme Court, in adhering to its doctrine of following the laws of the States, should follow that law as construed by the State Courts. "It is upon the very principle for which I am contending that our State laws receive the interpretation, which those who framed them designed they should have, that the intention of our State Legislatures is carried out when these laws are brought into controversy in the Federal tribunals. The decisions of State Judges are considered in these tribunals as part and parcel of the laws which they are called to interpret, the principle which I maintained being equally applicable to acts of ordinary legislation and to the fundamental law. When a question arises there upon the construction of a State law, the Judges of these tribunals do not undertake to interpret it according to their own understanding. The immediate inquiry is, what construction has been given to this law by the State Judiciary; and that construction is the rule of interpretation in the Federal tribunal."

[2] *27th Cong., 1st Sess.*, and *App.*, 161, 341, 180, 201, speeches of Buchanan, July 7, Sept. 2, Woodbury, July 10, Benton, July 27, 1841.

Court that a National Bank is constitutional, however much urged on the other side as binding and final, has been merely a decision contingent on certain facts. It is, that any existing institution, first agreed by Congress to be necessary and proper, is by them [the Court] considered in that event constitutional, but not so in any other event. . . . Such a judicial opinion covers the legality of only that special charter granted under those special facts, and decides nothing as to any other period or any other proposed charter." And, as Benton said: "It decides that the constitutionality of the institution depends upon its necessity to the Government, and that of this necessity Congress is the sole judge."

This debate on the Fiscal Bank bill also produced severe criticisms of the Court's decision in the *Dartmouth College Case.* "I think it is not law and could not be recognized as law, were the question again brought before that Court," said Benjamin Tappan of Ohio. "It is, in truth, an instance of judicial Constitution-making, not very uncommon formerly with the Court who gave the decision . . . an ægis manufactured by judicial charlatans for preservation of bank charters." Denying that a charter was a contract, or ever intended to be included within the term "impairment of obligation of contract," he continued: "Nothing proves more clearly the great influence of corporations in a society than the prevailing opinion that it would be unsafe to trust Legislatures with the power of repealing charters. Why unsafe? . . . Even if your Legislative Assembly is composed of the most intelligent, pure and upright men, they cannot foresee the effect of their legislation in all cases. They may incorporate companies which to their judgment can only be used beneficially for the public, and yet they may be mistaken; the chartered powers which they have conferred

may prove to be powers of mischief and destruction, instead of being used to promote the public interest and welfare; guided by a private cupidity, they may be used to corrupt the morals of the people and sap the foundations of our government, and yet upon this theory of vested rights, there is no remedy—the enslaved people must submit." [1]

The second extension of Federal power denounced by the Democrats was the enactment of the Whig National Bankruptcy Act of August 12, 1841. This measure, which extended the privilege of voluntary bankruptcy to all classes of persons, had been passed as a result of earnest pressure from debtors ruined by the banking and currency troubles and the land speculations of the past decade. The fact that imprisonment for debt still existed in many of the States rendered the condition of many debtors utterly desperate. The number of insolvents was estimated by some as high as five hundred thousand. At the South, the situation was particularly distressing.[2] In spite of the economic pressure for this legislation, however, there was a vigorous political opposition to the Act from the Democrats, based chiefly on two grounds: first, its unconstitutionality, as being in fact an insolvency law and not a bankruptcy law within the meaning of the Constitution;

[1] *27th Cong., 1st Sess.*, and *App.*, 195, speeches in the Senate of Benjamin Tappan of Ohio, July 14, Thomas H. Benton of Missouri, July 27, 1841.

[2] John J. Crittenden wrote Dec. 9, 1842, as to the Bankruptcy Act: "It was one of a series of measures urgently sought for by the Whigs of New York, Louisiana, etc. and rather conceded to them than desired by those of the Kentucky Whigs who supported it. It has to a great extent accomplished its object, and though there may have been abuses, it has relieved from imprisonment (for in many of the States that remedy is continued) and a hopeless mass of debt, many an honest man whose fortunes had been wrecked in the disastrous times through which we have passed." *Life of John J. Crittenden* (1871), by Ann M. B. Coleman, I.

It should be noted that the need of national bankruptcy legislation had been recently emphasized by the decision of the Court in 1840 in *Suydam* v. *Broadnax*, 14 Pet. 67, reaffirming the doctrine that a State insolvent law could not operate to bar contracts made in another State.

second, its invasion of the sovereignty of the States. "It is much more glaringly unconstitutional, much more immoral than the Alien and Sedition Laws," said Senator Benton. "The most daring attack on the State laws and the rights of property and on public morals which the history of Europe or America has exhibited. . . . It broke down the line between the jurisdiction of the Federal Courts and the State Courts in the whole department of debtors and creditors . . . bringing all local debts and dealings into the Federal Courts at the will of the debtors." [1] Senator Woodbury said that it brought the States "into the whirlpool of the Federal Courts, and is an alarming encroachment on State-Rights, because such an act, coupled with a like usurping power . . . to transfer from the States the trial of all burnings and murders like those of McLeod to the same Federal Courts, . . . tends most rapidly to prostrate all State independence, as well as to build up a frightful, monopolizing, overshadowing despotism at the centre, which neither our fathers contemplated, nor we should tolerate." A leading Democratic paper, after describing the bill as "working a regular process of encroachment on State jurisdiction," said that: "The whole latitudinarian school will go for it, because it invades State jurisdiction, extends Federal power, destroys contracts and brings the persons and property of the people under the sceptre of the Federal Judges." [2]

The third extension of Federal power was the Act of August 29, 1842, conferring upon the Federal Courts authority to issue writs of habeas corpus in certain cases of persons confined by the States. This legislation had

[1] *Thirty Years' View* (1856), by Thomas H. Benton, II, 464, 233; *27th Cong., 3d Sess.*, speech of Woodbury, Feb. 25, 1843.

[2] *Washington Globe*, March 8, 1842; see *ibid.*, May 5, 1842; and for description of the political factors in bankruptcy legislation see *New York Evening Post*, Feb. 26, 1840; *Story*, II, 404, 405, letters to Berrien, April 29, July 23, 1842; *J. Q. Adams*, X, 529.

originated in the dangerous complications which had arisen out of the trial in the New York State Court of Alexander McLeod, a British citizen, indicted for murder, in connection with the steamer *Caroline* episode in 1838. Though McLeod's defense was founded on international law, and though Great Britain denied the right of the State of New York to insist on trial under the international circumstances, the Federal Government had been powerless to prevent the trial. To obviate such a condition and to enable the Federal Courts to take jurisdiction, a bill was introduced providing for the issue of a writ of habeas corpus by such Courts, in case a foreign citizen should be imprisoned by any State for "any act done or committed under any alleged right, title, authority, privilege, protection or exemption set up or claimed under the commission, order or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations or under color thereof." This measure, favored by Webster and the Whigs generally, encountered heated opposition from the Democrats. "It is one of the most high-handed, daring invasions of State-Rights which Federalism has ever yet attempted," said the *Washington Globe*. "Truly between the bankrupt law, which invades and captures nearly all the civil jurisdiction of the State Courts, and this habeas corpus against the States, which may oust them of all their criminal jurisdiction, the poor States stand a good chance to be stripped of nearly all their judicial authority."[1] Senator Buchanan termed it "a dangerous and untried experiment, calculated to bring the sovereign States into collision with the Fed-

[1] *Washington Globe*, April 27, 1842, further said: "The friends of the reserved rights of the States will not be frightened into a surrender of their rights upon any cry, real or sham, of war with an arrogant power which seized the present brief period when Federalism is in power to bear down upon us. This bill is a British bill and is properly brought forward now."

eral Government, and thus to endanger the peace and harmony of the Union . . . an extension of the jurisdiction of the Federal Courts over criminal cases arising in the sovereign States under their own laws, which, from its very nature, cannot fail to wound their sensibility and arouse their jealousy." "It will produce dangerous collision between the Federal and State authorities," he said, "and you will have to enforce the mandates of the District Judge by the armed power of the Executive. There are cases in which the States will not patiently submit to be stripped of their inherent jurisdiction over criminals."[1] This bill is "one of those silent encroachments in the march to power, not likely to attract the attention of the great body of the people;" said Arthur P. Bagby of Virginia, but "the idea of State sovereignty is lost, if this colossal power can be exercised constitutionally by the Government." Senator Benton termed it "the infamous act . . . polluting our code of law."[2]

The bill requiring the States to elect their Congressmen by districts was the last of the extensions of Federal control, and was equally attacked as unconstitutional and unjustifiable.[3] "All the dangerous collisions which have ever existed between the State and Federal authorities have arisen from the exercise of doubtful

[1] *27th Cong., 2d Sess.*, and *App.*, 382, 355, speeches in the Senate, of Buchanan, May 9, Arthur P. Bagby of Virginia and Calhoun, July 8, Robert J. Walker of Mississippi, June 21, Aug. 3, 1842; speeches in the House of John G. Floyd of New York, Samuel Gordon of New York, William Smith of Virginia, Aug. 15, 1842. See also especially speeches in Senate of Berrien of Georgia, April 26, Huntington of Connecticut, May 10, 11, Choate of Massachusetts, July 8, 1842, supporting the bill. The bill passed by a strict party vote, and see speech of John McKean of New York in the House, Jan. 12, 1843. *27th Cong., 3d Sess.*

[2] *Thirty Years' View* (1856), by Thomas H. Benton, II, 276–304, 437.

[3] *27th Cong., 2d Sess.*, speeches of Buchanan and Woodbury, June 2, 4, 1842. It was stated in the House, April 6, 1846, that New Hampshire, Mississippi and Missouri had failed to comply with the Congressional Districting Act, and were electing their members by general ticket. "This is rank, practical Nullification." *29th Cong., 1st Sess.*

and dangerous powers by Congress," said Buchanan. "This is an attempt to interfere with what immediately concerns the dearest domestic institutions of the States, their discretion as to the mode in which they will elect their Representatives to Congress." Senator Woodbury said that there had been more alarming encroachment by the General Government on the sacred rights of the States in the last twelve months than in the previous half century — "the bankrupt law, in a form voluntary, novel, unconstitutional, and absorbing within the vortex of the General Government the jurisdiction over almost the whole system of contracts as well as liens and of the action of the State Courts over them— the distribution bill by which all the States were to come and feed from the public crib of the General Government and be subjected, in return for it, to unconstitutional taxation. . . . Next, close at the heels of the others, was the attempt to strip the States of all criminal jurisdiction for burnings and murders committed within their limits, if defenses were set up like those of McLeod. . . . Last of all, a bill unprecedented in our annals, a bill dictating to the States as to their system of elections, and no less encroaching in its principle and overshadowing in its influence on State independence than the numerous other measures that have, in such rapid succession, characterized the policy, so fatal towards the States, of those now in power in the General Government."

That these reiterated attacks by the Democrats in Congress upon the alleged encroachments on the sovereignty of the States met with little response in the Court was interestingly shown at its next session, in 1843, when, in the only decision of historic importance rendered by it, the doctrine of the *Dartmouth College Case* was applied with great strictness, and a State stat-

ute seriously affecting commercial relations in the States was held unconstitutional. The case of *Bronson* v. *Kinzie*, 1 How. 311, in which this decision was rendered, had involved a recent statute of Illinois providing that a mortgagor's equity should not be lost for twelve months after foreclosure sale and that no sale should occur unless two thirds of the appraised value should be bid for the property. This was one of the many statutes which had been the outcome of the frightful state of business and finance then prevalent. The country had just passed through the panic of 1837; it was in the midst of the era of State bank failures and of State debt repudiations; scarcity of hard money had destroyed the inflated value of property; men who had debts to pay were forced to dispose of their property at ruinous prices to the few who had money to buy. As a consequence of these conditions, State after State had enacted statutes for the relief of debtors, stay-laws postponing collection of debts, relief-laws modifying remedies on contracts, laws granting exemption from execution and postponing sales on execution and foreclosure of mortgages.[1] So far as these statutes applied to contracts made prior to their enactment, they were everywhere attacked by creditors as mere attempts to enable debtors to escape payment of their just debts. And newspapers in the commercial centers, criticizing "the unconstitutionality as well as the impolicy of the dishonest and knavish legislation which, more than all the defalcations of individual swindlers though multiplied a thousand-fold, attests the almost hopeless depravity and corruption of the age", expressed the confident hope that the Court would "determine the paramount law of the land to

[1] See laws of Pennsylvania, Virginia, Ohio, Indiana, Illinois, Michigan, Mississippi, New York, Georgia, Kentucky, Tennessee, Michigan, Missouri. *History of the People of the United States*, by John Bach McMaster, VII, 44–48.

be in strict accordance with the immutable principles of honesty and justice. Meanwhile, we congratulate the whole business community that the vexed question will soon be put at rest, and in a way, we trust, that will command their hearty acquiescence." [1] The hope so expressed was made a reality by the Court; for in its decision, speedily rendered, it held that statutes of this nature, changing the mortgage laws of the State, affected the rights, and not merely the remedies, of a mortgagee, and were, therefore, in violation of the clause of the Constitution forbidding the impairment of obligation of a contract. "It would be unjust to the memory of the distinguished men who framed the Constitution," said Taney, " to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life. It was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts and to secure their faithful execution throughout this Union by placing them under the protection of the Constitution." [2] Those who, in 1837, had feared that in his decision in the *Charles River Bridge Case* Taney had departed from Marshall's doctrines, now witnessed him announcing a decision which carried Marshall's view of obligation of contract even further than Marshall had himself. "I read the opinion," wrote Story to Taney, "with the highest satisfaction, and entirely concur in it. I think your opinion is drawn up with great ability, and in my judgment is entirely conclusive," and after regretting Judge

[1] *New York Journal of Commerce*, Feb. 8, 1843.

[2] In view of the widespread and important interests involved, it was singular that the case was not argued orally; and as Taney said in delivering the opinion: " On the part of the complainant, a printed argument has been filed (by Isaac N. Arold), but none has been offered on behalf of the defendant. As the case involves a constitutional question of great importance, we should have preferred a full argument at the bar."

McLean's dissent, Story added: "There are times in which the Court is called upon to support every sound constitutional doctrine in support of the rights of property and of creditors." [1]

Unquestionably, the country owes much of its prosperity to the unflinching courage with which, in the face of attack, the Court has maintained its firm stand in behalf of high standards of business morale, requiring honest payment of debts and strict performance of contracts; and its rigid construction of the Constitution to this end has been one of the glories of the Judiciary. That its decisions should, at times, have met with disfavor among the debtor class was, however, entirely natural; and while, ultimately, these debtor-relief-laws have always proved to be injurious to the very class they were designed to relieve and to increase the financial distress, fraud and extortion, temporarily, debtors have always believed such laws to be their salvation and have resented judicial decisions holding them invalid. Consequently, this opinion of the Court in the *Bronson Case* aroused great antagonism in the Western States. In Illinois, a mass meeting was held which resolved that the decision ought not to be heeded, called on Illinois officials to withstand the findings of the Court or resign and declared that they would resist peaceably or forcibly as might be necessary.[2] Judge McLean (who had warmly dissented) stated, in holding Circuit Court in Illinois, that he should hold the law invalid in that Court, not because he believed it so, but only because of the controlling power of the Supreme tribunal; but he refused to hold invalid a stay-law relative to sales on execution, although containing similar provisions to the mortgage

[1] *Taney*, 289, letter of Story, March 25, 1843.

[2] See *Sangamon Journal* (Springfield, Ill.), March 16, 1843; *Missouri Republican*, March 6, 1843; *Niles Register*, LXIV, June 17, 1843.

law.[1] An Ohio law magazine termed the Bronson decision "a wide departure," and spoke of the "uncertainties in title to real estate already produced in Indiana and Illinois, and the consequent sacrifice of prosperity."[2] Later, deference to the antagonism aroused against the Court by this decision was made when the Senator from Illinois, James Semple, introduced in the Senate in 1846, a joint resolution proposing a Constitutional Amendment to prohibit the Supreme Court from declaring void "any Act of Congress or any State regulation on the ground that it is contrary to the Constitution of the United States or contrary to the Constitution of any particular State."[3] The effect of the Bronson decision upon the financial conditions of the country was rendered the more severe by reason of the fact that, almost coincident with that decision, came the repeal of the National Bankruptcy Act by Congress, on March 3, 1843; and thus, at the same moment, relief was denied to debtors under both State and Federal laws.

At the end of this 1843 Term, it became evident that a considerable change in the membership of the Court was impending. The death of Judge Baldwin, whose mental powers had been impaired, was expected at any moment; Judge Thompson was seriously ill; and Judge Story was considering his resignation, for his relations with his Associates had been unpleasantly affected by an episode occurring during the Term — the appoint-

[1] A similar stay-law of Illinois as to executions was held invalid in 1844, in *McCracken* v. *Hayward*, 2 How. 608; and a similar law in Indiana in 1845, *Gantly* v. *Ewing*, 3 How. 707; see also *Law Reporter* (1843), VI, 46.

[2] *Western Law Journ.* (1846–47), IV, 254; V, 173; "Who can foresee the amount of litigation, who can foretell the evils to flow from this unhappy confusion of obligation, and remedy, of contract and judgment?" Chief Justice Gibson in *Chadwick* v. *Moore* (1844), 8 Watts & Serg. 49, refused to follow the decisions of the Supreme Court of the United States as to this form of statute.

[3] *29th Cong., 2d Sess.* John M. Berrien, Senator from Georgia, introduced a bill to regulate the appellate jurisdiction of the Court, on Jan. 19, 1847. Both of these measures died, however, in the Committee on the Judiciary.

ment of Gen. Benjamin C. Howard of Maryland as Reporter of the Court in place of Richard Peters. Though Peters had served since 1828, personal friction had long existed between him and Judges Baldwin and Catron; there had been complaint also as to delays in publication of his reports;[1] and the newspaper press had resented difficulties put in its way by the Reporter relative to the furnishing of copies of opinions.[2] His removal, while possibly justifiable, had been made in so extraordinarily summary a manner as to arouse considerable sympathy; for no advance intimation of such a step had been given by members of the Court, and it was taken at a time when neither Judge Story nor Judge McKinley had reached Washington and when the vote of the other Judges was divided — Baldwin, Wayne, Catron and Daniel favoring Howard, and Chief Justice Taney and Judges McLean and Thompson voting for Peters.[3] Of this action, Judge Story wrote to McLean that he had "seldom been more pained", and that the removal was wholly unexpected and beyond anything

[1] See *Sumner Papers MSS*, letter of Peters to Sumner, Aug. 23, 1843, as to "a most unexpected and unmerited attack by the publication of what he (Catron) calls *Errata* spread out into three pages in the volume of Mr. Howard." See also *McLean Papers MSS*, letter of Peters to McLean, Jan. 23, 1843 (five days before Peters' removal), explaining that delays were frequently due to withholding of opinions from the Reporter by the Judges, and stating that publication of Vol. 16 of *Peters Reports* "was delayed five weeks for want of your own opinion in the *Prigg Case*."

[2] *National Intelligencer*, March 3, 1842; March 12, 1844. The *National Intelligencer*, March 17, 1835, published a correspondence between Richard S. Coxe, Richard Peters and Chief Justice Marshall relative to publication to Supreme Court opinions by Duff Green, the editor of the *United States Telegraph*, as interfering with the official reports. To Peters, Marshall had written, March 14, 1835: "Your gentlemanly deportment and the accuracy and fidelity with which your official duties have been performed, have secured the lasting esteem of, dear Sir, your obedient servant, J. M."

[3] The appointment of Howard was made under the recent Act of Aug. 26, 1842; see also comments on this appointment in *United States Gazette*, Jan. 29, Feb. 1, 1843; *National Intelligencer*, Jan. 30, 1843; *Western Law Journ.*, I, 83. Peters himself wrote an indignant letter to Charles Sumner, Feb. 11, denouncing the "coarse, rude, and ungentlemanly mode" in which the removal was made without any intimation of it to him in advance, and attributed it largely to the "malignant hostility" of Judge Baldwin, *Sumner Papers MSS*.

he could have dreamed of; that Peters had always been most courteous and deferential to the Court and "ought not to have been subjected to the mortification of an ejection from office without notice and without enquiry." He also wrote that he felt personally "the full force of this neglect and want of courtesy", of the other Judges in making the appointment in his absence, "an occurrence which never before took place during the absence of a Judge, accidental or otherwise, since I have belonged to the Court, in matters that equally concerned all of them. But let it pass, I no longer ever expect to see revived the kind and frank courtesy of the old Court, and I am content to take things as they are." [1]

On December 18, 1843, Judge Smith Thompson died, after twenty years of service on the Bench. "He was not only their honored and respected Associate in the discharge of their official duties, but he was beloved as their friend and endeared to everyone by his frankness, his kindness and his unstained honor," said the Court in response to the resolutions of the Bar. The vacancy caused by his death (which left Judge Story the only survivor of the old Marshall Court) gave rise to a prolonged contest between the Executive and Senate. The bitter political feud between President Tyler and the Whigs was now at its height. Tyler had determined to become a candidate for the Democratic nomination for President; and any nomination for the Bench which he might make was certain to be subjected to searching scrutiny by the Senate. No one, however, anticipated the extraordinary move which Tyler now made. Mar-

[1] *McLean Papers MSS*, letter of Story to McLean, Feb. 9, 1843. Charles Sumner wrote to McLean, Feb. 2, 1843, *ibid.*: "I think that nothing has occurred at Washington which has affected his (Story's) spirits so deeply. His sleep was destroyed the night after he received your letter." (Incidentally, Sumner added that if Peters had resigned, he himself would have liked to be a candidate for the position, as suggested by Story and McLean.)

tin Van Buren, seemingly at the height of his popularity, was the leading candidate of the Democracy for the Presidency; and it was to this political opponent and rival that Tyler ingenuously made the offer of the vacant position on the Court. The episode was described by Silas Wright, Senator from New York and leader of the Van Buren Democracy (then becoming known as the Locofocos), in an extraordinary, vivid letter to Van Buren, as follows: [1]

> Our day yesterday was beautiful and the consequence was a very great press at the President's house. I was there about one o'clock and never saw more people, and never so few whom I knew. It is said that very few of the prominent Whig members or their families presented themselves. Still, I doubt not that the Captain is delighted this morning, and is now more than ever satisfied that the *masses* are clearly for him, and that he is even more personally popular with them than even Gen. Jackson was. The fact that the Clay-Whigs staid away will increase his confidence and his joy. Is it not happy to be so constituted? . . . I never knew the city so entirely destitute of strangers at this season of the year or the hotels appearing so desolate. You will ask where our crowd have come from? I suppose mostly from the City, and from Georgetown, Alexandria and Baltimore. I never saw so few carriages at the levee by quite the half, and yet I doubt whether there were ever more people. So that you will see I shall agree with the Capt. that it was a *democratic* turnout. Indeed I never knew half so many of the dignitaries and their ladies walk.
>
> But enough of this, as you have a more direct interest now discussing here, of which it is my object to speak and not of the proceedings at Court, on New Year's Day. You have been made a candidate for the vacancy upon the bench of the Supreme Court, for a week past, and for a portion of this time your prospects have been said to be decidedly promising — better even than those of our friend Spencer. You

[1] *Van Buren Papers MSS*; letter of Wright to Van Buren Jan. 2, 1844; see *History of the People of the United States*, by John Bach McMaster, VII, 345, quoting part of this letter.

must not suppose me as attempting to hoax you or to play off a joke upon you. I am telling you the mere truth, and for the last week and a half, I expected your nomination to us as an Associate Justice of the S. C. of the U. S. The first intimation of this sort which came to me was from General Mason of Michigan, the father of the late Gov. Mason, whom you doubtless know very well. He called upon me very diplomatically and broke the subject to me in the most solemn and formal manner. I can usually keep my face when I try hard to do so and have any warning that the effort will be required, but this took me too much by surprise and I did not succeed at all, but met the suggestion by a most immediate fit of laughter. Seeing that this annoyed the General more than I could suppose it ought, the idea at once occurred to me that he had been sent to me from a high quarter. I at once changed my manner and left him at liberty to talk on — I discovered too that he had a carriage at the door, and apologized for detaining him and leaving his driver exposed to the storm, for I think he had sat an hour and it rained and blew most violently. He said that was of no consequence and remained, I think, for full another hour. I told him very gravely that I was sure you would not seek, or accept, the place, if your name had not been and was not to be connected with the Presidential election at all, and so believing I must suppose you would be compelled respectfully to decline the offer, if made, situated as you was, but really treated the matter decorously. This seemed to please him, and he talked very freely, professed to be strongly your friend, but was perfectly convinced you could not be elected President, if nominated; and what was more sagacious, entertained quite as deep a conviction that the consequence of your appointment as Judge would be *my* nomination for President with the certainty of an election. I asked him very gravely if Mr. Tyler thought as he did upon that point, and then he said he had not seen, or conversed, with Mr. Tyler upon either subject, but he *knew* that your name had been presented to him, as a proper one to be used in his nomination of Judge, and that too by some of your best friends.

In the course of the conversation, he often asked me if I thought either you, or your friends, could look upon your nomination by the President as an act of hostility to you or

as an attempt to degrade you, and whether, if you were nominated, your friends in the Senate and even I *could* vote against you, and he seemed anxious to have my answers upon those points. I finally told him that to propose a man for a place upon that elevated Bench, and thus proclaim to the country his fitness and that by a political opponent, could not be tortured into an act of hostility; that no man in this Country was so high as to be authorized to feel himself degraded by the offer of such a position, and that I certainly could not vote to *reject* your nomination for such an office. These replies seemed to delight him, and his answer was quick and triumphant with deep laughter: "You are right, you are right, you *can't* vote against him." At length, rising to go, he asked me what, upon the whole, I thought of the proposition. I replied, very steadily looking him in the face: "Tell Mr. Tyler from me that if he desires to give the whole country a broader, deeper, heartier laugh than it ever had, and at his own expense, he can effect it by making that nomination." This did not seem to please him, and he left at once. I laughed myself almost sick, not entertaining a doubt, as I do not now, that the Capt. had sent him to me. Still, I kept the communication wholly to myself, only getting my wife to help me keep it and to help me laugh, and did not hear another word upon the subject for two or three days, when all at once the matter became one of public notoriety, and conversation and laugh; and since that time I have it from Davies, who gets his news from Parmelee, that the President has been, upon various occasions, determined to send your name, and has considered the movement one of the most happy which ever occurred to a statesman, and that his friends had had great trouble to keep him from doing it. My information of yesterday, however, is that your prospects are at an end and that Spencer's name will be given to us tomorrow.

Wright s discouragement of Tyler's project to appoint Van Buren had its effect; and on January 8, 1844, the President sent to the Senate the name of John C. Spencer of New York, a lawyer of great talent, but a man whose varying course in politics had brought upon

him the violent enmity of a portion of the Whig Party. Though an ardent Whig in politics, a strong former opponent of Tyler, his opposition to Henry Clay as a Presidential candidate had led him to accept from President Tyler appointments, first as Secretary of War, and next as Secretary of the Treasury. He had administered the latter office "with an ability, assiduity, integrity and faithfulness seldom equalled since the days of Hamilton", wrote a contemporary, "a man of great abilities, industry and endurance, curt manners and irascible temper."[1] The appointment was highly obnoxious to the Clay Whigs.[2] "I have no confidence in the political integrity of Mr. Spencer," wrote Erastus Root of New York to Senator John J. Crittenden. "He was always first to foist himself into any political party which could give him hopes of prefermeat. . . . There is but one consideration in this instance to recommend him to Whig favor; that is, to place him in a situation where he can inflict but little political injury." Henry Clay wrote to Crittenden that "if Spencer be confirmed he will have run a short career of more profligate conduct and good luck than any man I recollect." Francis Granger of New York wrote that Spencer's recreant course at Washington had "developed a character that should not be approved by an appointment to one of the most dignified positions in the world"; that ninety out of one hundred Whigs in New York were opposed to

[1] *Public Men and Events* (1875), by Nathan Sargent. "Before being tendered a position in Mr. Tyler's Cabinet, he had written an address upon his (Tyler's) treachery to the Whig party, more severe than anything that appeared from any other quarter. He fairly flayed the President, lashing him as with a whip of scorpions."

[2] *John J. Crittenden Papers MSS*, letters of Erastus Root, Jan. 1, 1844, Henry Clay, Jan. 24, 1844, Francis Granger, Feb. 3, 1844. Stephen Van Rensselaer wrote to Crittenden from Albany, Jan. 20, 1844, that it would be a great injury to the Whig cause to confirm "one who has been and always will be bitterly opposed to the elevation of Mr. Clay to the Presidency", and that in politics "he is the most finished scoundrel I know." The *New York Herald*, Feb. 9, 14, 1844, stated that the opposition to Spencer was headed by Webster.

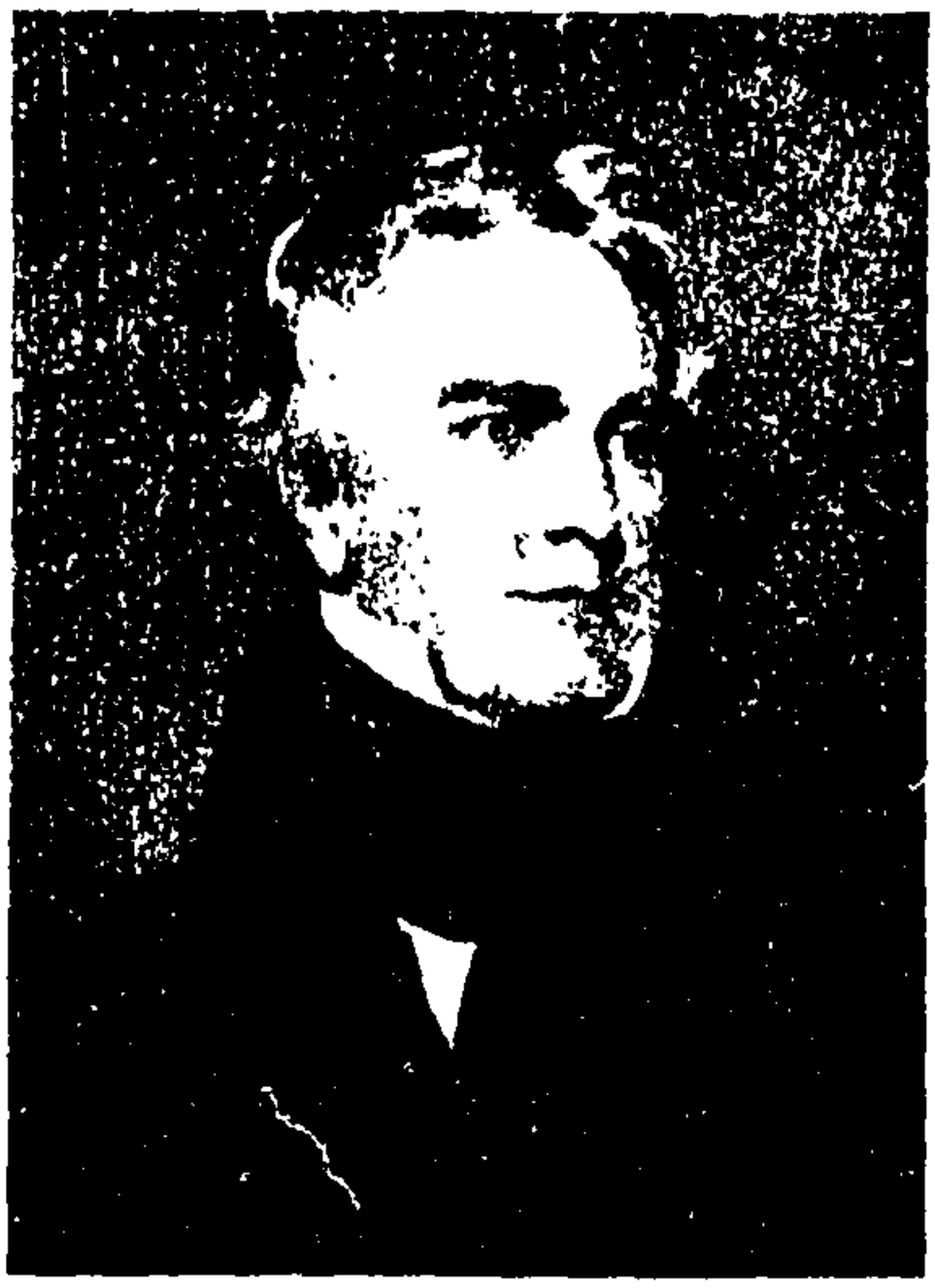
Spencer's confirmation, that the universal sentiment was: "Well, if such treachery is to be rewarded by the votes of those who have been betrayed, we do not see any necessity for political integrity." In view of the nominee's unpopularity, and of the Whig bitterness towards him, it became evident that he could not be confirmed, although, wrote a Washington correspondent, "all acknowledge his legal ability to fill with honor the office." [1] On January 31, .1844, the Senate rejected the nomination by a vote of twenty-one to twenty-six. "Spencer has terrible but just punishment," wrote Thurlow Weed. "But it was hard, killing him. He made a tremendous struggle for confirmation." "The Senators felt," said the *New York Herald*, "that our Supreme Court is our last bulwark, our fortress, our rock and tower of defence when all else fails and the vacancy must be filled with a man of diamond purity, and adamantine integrity." "I consider the rejection of Spencer as one of the very best acts of the Senate," wrote Senator Crittenden to Granger. "His confirmation would have been a plain violation of all public political morality and would have been to make the Supreme Court an asylum for broken down, disgraced and guilty politicians. As far as I can hear, the people everywhere approve his rejection." [2] While the rejection was thus

[1] *New York Herald*, Jan. 6, Feb. 2, 1844. On Jan. 16, 1844, the correspondent wrote that there was considerable feeling in Washington that the appointment ought to be confirmed, out of justice to the President and respect to the Supreme Court, in order that the Bench might be filled before the argument of so great cases as those of the *Girard Will* and of *Myra Gaines* then pending.

[2] *Francis Granger–Thurlow Weed Papers MSS;* letter of Weed to Granger, March 11, 1844, letter of Crittenden to Granger, Feb. 10, 1844. Crittenden continued in this letter: "I congratulate you on the bright and heightening prospects of the Whigs. Unless all human reasonings and appearances are vain, there can be no doubt of the success of their cause, and the election of Clay to the Presidency."

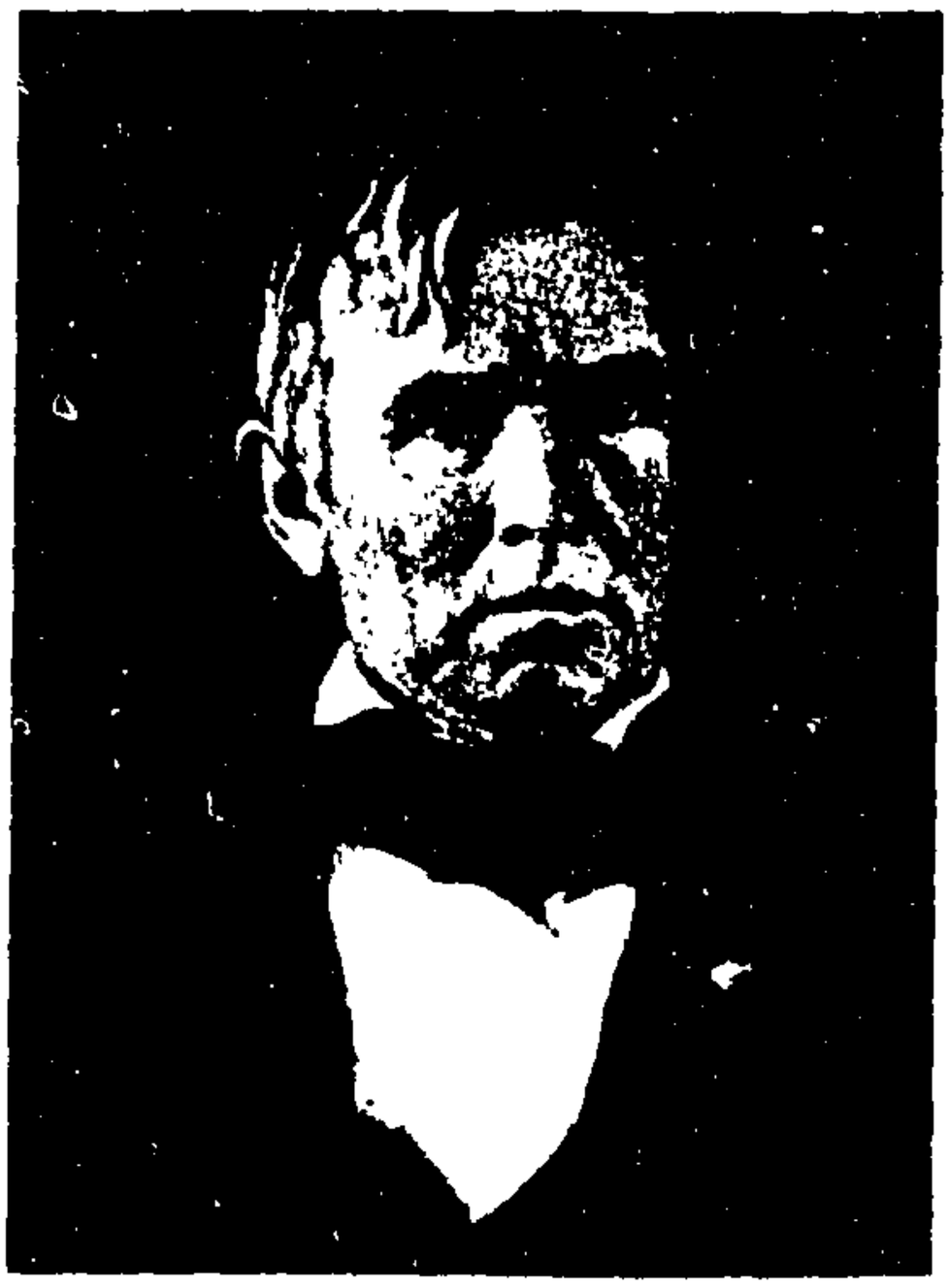
Eliphalet Nott wrote to Chesselden Ellis (Congressman from New York), Feb. 4, 1844: "I perceive that the die is cast and that our friend Spencer is rejected. So be it, I only hope that a worse man may not be forced, through party animosity, upon the country." *Mass. Hist. Soc. Proc.*, LII. The *Madisonian*, the Tyler Administration paper in Washington, hotly criticized "the sanguinary proceedings

JOHN SERGEANT



HORACE BINNEY

REVERDY JOHNSON



JOHN J. CRITTENDEN

placed upon high moral grounds, the fact was that it was due solely to Whig politics.

After this rejection of an eminently qualified lawyer from New York in the Second Circuit, President Tyler next made the unusual move of offering the position to two of the great leaders of the Supreme Court Bar, coming from another Circuit (the Third) — John Sergeant and Horace Binney of Philadelphia. These two lawyers were then engaged in arguing the *Girard Will Case* before the Court, and their ability had strongly impressed the President. The curious manner in which the offers of appointment were received has been told by Henry A. Wise of Virginia, through whom they were made, as follows:[1] "The evening after Mr. Binney had concluded his great argument . . . Mr. Sergeant was visited by us, at his hotel, to deliver the message of Mr. Tyler. Mr. Binney was in the next room. Mr. Sergeant received the compliment with graciousness and evident pleasure; but he hesitated not to decline the tender of a place upon the Supreme Bench. Before he assigned his reason, he enjoined secrecy during his life, and especially it was not to be disclosed to Mr. Binney. It was that he was past sixty years of age, and that he ought not to accept, but he regarded Mr. Binney as being much more robust than himself, considered that Mr. Binney might accept, and did not wish him to know that he had declined because he considered himself too old, and requested that the President would make the tender of the place to him. It was tendered to Mr. Binney at once, and, behold, he declined it for the same

of the Senate", "the private pique and party considerations" which had led to Spencer's rejection, and stated that it was principally due to Senator Thomas H. Benton; see issues of Jan. 24, 31, Feb. 10, 12, 13, 1844.

[1] *Seven Decades of the Union* (1876), by Henry A. Wise. In the *Life of Horace Binney* (1903), by Charles C. Binney, a doubt is intimated as to the accuracy of the details given by Wise, but, in the main, Wise's account seems to be accurate.

reason, but begged that Mr. Sergeant should not be informed of his reason, and that the place might be tendered to him. Neither, we believe, ever knew the reason of the other for declining." Failing to secure the acceptance of either of these Philadelphia lawyers, the President again turned to the Second Circuit; and several lawyers of distinction were considered for the position. At one time, the newspapers stated that the nomination of Henry Wheaton of New York, the former distinguished Reporter of the Court and recently Minister to Prussia, had been absolutely determined upon. William L. Marcy, Governor of New York, who had resigned from Tyler's Cabinet, had strong friends "who knew and appreciated his worth and peculiar fitness", and his chances for appointment were considered favorable.[1] Hiram Ketchum of New York was said to be backed by Tyler's Secretary of State, Daniel Webster; and Ralph J. Ingersoll of Connecticut, and Cornelius Peter Van Ness of New York were considered as possibilities. In March, Tyler twice offered the position to the Democratic leader of the Senate, Silas Wright who, though urged by Judge Daniel to accept, twice declined the position, probably wisely, as his

[1] *New York Journal of Commerce*, Feb. 17, 21, March 9, 1844; *Boston Post*, Feb. 19, 1844; *New York Tribune*, Feb. 13. 17, 1844. Marcy's chances of appointment apparently disappeared when his warm supporter, Thomas W. Gilmer of Virginia, Secretary of the Navy, was killed Feb. 28, 1844, in the shocking explosion on the gunboat *Princeton*, on the Potomac River below Mt. Vernon, of which Silas Wright wrote to Van Buren, March 1, 1844 (*Van Buren Papers MSS*): "We are at this moment as much in the dark about the Judgeship as you can be. Two weeks ago, I thought the Chancellor had some prospect, and one week ago, I supposed the same thing of Marcy, but the delay has induced me to suppose that neither nomination is now probable. I relied upon Gov. Gilmer for Marcy's prospect and the awful calamity which we have witnessed here has deprived us of his support further. I cannot write of that shocking affair. The papers will tell you all I know and it is too horrible to think of. It was rumored, a few days since, that the Whigs were making another effort at conciliation, so as to secure the Judge, and I think the fact was so; and you can see, if it was so then, and for that single office, how much more likely such an attempt will be now vigorously made when the two Cabinet places fall in to be struggled for."

confirmation by the Senate would have been doubtful.[1] "No one can conjecture what we shall have as a Judge for the Second Circuit. What the President will do, we cannot determine," wrote Judge Story. "I have my own wishes on the subject, strong and warm, but I have no hope that they will be gratified. I want an associate of the highest integrity, with youth and ambition enough to make him become a deep student in all the law, and with a spirit of love for the Constitution, and an independence to proclaim it, which shall make him superior to all popular clamors — and these to be united with courtesy of manners and kindness of heart. These, I admit, are high qualities; but I think I could find them, and so could you, if either of us had the appointment." [2]

Finally, on March 13, 1844, Tyler sent to the Senate the name of Reuben H. Walworth, then Chancellor of the State of New York. The new appointee, though unquestionably of the highest legal ability, was not only personally unpopular but politically disliked by the Whigs; and Thurlow Weed of New York wrote at once to Senator Crittenden:[3] "He is recommended by many distinguished Members of the Bar of the State *merely because they are anxious to get rid of a querulous, disagreeable, unpopular Chancellor.* Indeed so odious is he that our Senate, when a majority of his own political friends were members, voted to abolish the office of Chancellor. Those who recommended him admit and avow that they did so to get him out of his present

[1] *New York Tribune*, Feb. 16, 1844; *New York Journal of Commerce*, March 9, 14, 1844; *Life and Times of Silas Wright* (1874), by Ransom H. Gillet.

[2] *Story*, II, 480, letter to Kent, March 2, 1844; and on April 25, he wrote to Kent: "O! that I had your excellent son (William Kent) as my colleague on the Bench; then should I feel ready to depart in peace. I have even thought that he and Mr. (Daniel) Lord were the only candidates that, as to age, qualifications and character, a President ought to select for the office."

[3] *John J. Crittenden Papers MSS*, letter of Weed to Crittenden, March 17, 1844.

office. Should this nomination be confirmed, we shall have a Loco Foco appointed to the office of Chancellor. If suffered to remain 'unfinished business', we may expect to see the Nation profit by the appointment of a better Judge of the Supreme Court, and when Walworth reaches the age of sixty, we may *hope* to get a better Chancellor."

While this nomination was pending, Judge Baldwin died, April 21, 1844, after serving thirteen years on the Court. "Poor Baldwin is gone. Another vacancy on the Bench. How nobly it might be filled! But we are doomed to disappointment," wrote Judge Story to Ex-Chancellor Kent. "What can we hope from such a head of an Administration as we now have but a total disregard of all elevated principles and objects? I dare not trust my pen to speak of him as I think. Do you know (for I was so informed at Washington) that Tyler said he never would appoint a Judge 'of the school of Kent'?"[1] To fill this second vacancy, President Tyler first tendered the position to James Buchanan who declined;[2] he then nominated Judge Edward King, a distinguished lawyer of Philadelphia, June 5, 1844.

The heated contest which had long prevailed between the President and the Whig Senate made it unlikely that his appointments would be confirmed. Moreover, Congress was again considering a rearrangement of the Circuits; and the Presidential election was approaching. And furthermore, John J. Crittenden, who had failed of confirmation in 1829 in the closing days of the Adams Administration, still had his eye on the Supreme Court; for, should Henry Clay, the Whig candidate for the President against James K. Polk, be elected, Crittenden no doubt would receive the appointment, if the filling

[1] Letter of Story to Kent, April 25, 1844, *Mass. Hist. Soc. Proc., 2d Series*, XIV.
[2] *New York Journal of Commerce*, June 20, 1844; *National Intelligencer*, June 19, 1844.

of the vacancy could be delayed until after the election.[1] Although influenced solely by personal prejudice, the Senate was sustained by the Whig newspapers, one of their leaders saying that it deprecated the evils of an incompetent, complying or corrupt Judiciary, and that it looked with entire confidence to the Senate. "Better the Bench should be vacant for a year, than filled for half a century by corrupt or feeble men, or partisans committed in advance to particular beliefs."[2] This statement, entirely unwarranted by the facts or by the character of the eminent lawyers nominated, illustrated the bitterness of the hostility to the President. Accordingly, on June 15, on the last day of the session, the Senate ordered the nominations to lie on the table — an act which brought upon the Whigs the bitter condemnation of the Democrats.[3] Five months later, Whig hopes were crushed by the election of Polk as President; and there was no longer the slightest excuse for a failure to confirm Tyler's appointees. A striking view of the situation was given in a letter from the former Reporter of the Court, Richard Peters, himself a Whig, to Judge McLean:[4]

> I look forward with growing apprehension to the condition of the Supreme Court within the next four years. May heaven in its tenderest mercy preserve the life of our good Chief Justice. Catron will succeed him, if he should, while Polk is President, be called to a better world. . . . The nominations of Judge King and Chancellor Walworth, now

[1] *New York Journal of Commerce*, March 19, 1844.

[2] *National Intelligencer*, April 26, 1844.

[3] See editorial of the *New York Evening Post*, quoted in the *Washington Post Office*, June 27, 1844, speaking of the "pitiful, canting defense of the Whig Senators." See also *National Intelligencer*, June 17, 1844, and *ibid.*, June 18, which describes a curious maneuver of Tyler's, who withdrew the nomination of Walworth and substituted Spencer's name; objection being made to its consideration, he withdrew Spencer's name and again reinstated the Walworth nomination. The vote on June 15 to lay on the table the nomination of Walworth was 27 to 20; as to King, 29 to 18.

[4] *John McLean Papers MSS*, letter of Peters to McLean, Dec. 6, 1844.

before the Senate, present an opportunity, by the confirmation of the first, to put on the Bench a man of sound opinions on all the great questions which have come before that Court. I was not the advocate of the confirmation of Judge King, when hopes were entertained that we should elect Mr. Clay. The question is now presented in very different aspects, and I most earnestly desire that he shall be confirmed. He is a man of very strong mind, with extraordinary judicial faculties. His opinions are all that you can desire. (See *Ashmead's Reports*.) For yourself, Judge Story, and such of the Court with whom you agree and associate, he has the highest respect. Altho' he has not the manner in private intercourse as polished as you justly appreciate, yet he has a strong sense of decorum and propriety. He and I have never belonged to the same political school, but I have always regarded him as possessed of perfect probity of character, and his judicial duties have always been performed with perfect impartiality. . . . If King is rejected the next nominee will be John M. Read, as suited for a Judge as I am for an admiral.

And a view of the King nomination from the opposite political standpoint is found in a letter written by John C. Calhoun to Francis Wharton, of Philadelphia, after the election of Polk, in November :[1]

I must say that your letter places his character in a light, which I have not heretofore regarded it. I had taken the impression, that although a man of talents, his political association connected him with a set of politicians of a very objectionable character which subjected his to doubt. Under this impression, I was disinclined to his nomination, without, however, taking any part against it while before the Senate. It is due to the occasion to say that the impression made on my mind, has, I am inclined to think, been made on that of many others; so much so, that his nomination will be in great danger, unless it should be well sustained from the respectable portion of your Bar and the City, especially if your two Senators should be opposed to him. I take it, that the wing of the party, usually opposed to the nomi-

[1] *Amer. Hist. Ass. Rep.* (1899), II, letter of Calhoun to Wharton, Nov. 20, 1844.

nations of the President, will be against him, which would certainly cause his defeat, unless he should receive the support of the better portion of the Whig party. If, however, your two Senators will support him, I should think his prospects would be fair. . . . I regard the defeat of Clay and the election of Polk, under all circumstances as a great political revolution. Great events may grow out of it, if the victory be used with prudence and moderation. There is much to be done to bring things right, and save the Government; but in order to be successfully done, it must be done gradually and systematically. I say, save the Government; for to my mind it is clear, that it cannot go on much longer as it has for the last 15 or 20 years, and especially the last 8.

In the closing days of his Administration, Tyler made a last attempt to fill the two vacancies on the Bench by withdrawing King's nomination[1] and sending in the name of John Meredith Read of Philadelphia, a former United States District Attorney, and by withdrawing Walworth's name and nominating Samuel Nelson of New York. Nelson was a lawyer of conspicuous ability, fifty-two years old, a Judge of the Supreme Court of New York for fourteen years and for seven years its Chief Justice. The choice was so preëminently a wise one that the Senate at once confirmed it, February 14, 1845, and on March 5, 1845, Nelson took his seat on the Bench, where he served for twenty-seven years. As to Tyler's other appointment, there was more difference of opinion. Richard Peters wrote to Judge McLean that Read was "as suited for a Judge as I am for an admiral." On the other hand, an equally strong Philadelphia Whig wrote to W. P. Mangum, the Whig Senator from North Carolina, that Read was "one of the very best appointments Mr. Tyler ever made"; that "a more correct gentlemanly man I never knew" and that the Whigs

[1] Tyler renominated King, Dec. 4, 1844, and withdrew the nomination, Feb. 7, 1845. Nelson was nominated, Feb. 4, and Read, Feb. 7.

wanted his confirmation rather than risk an appointment by President Polk. The Democratic papers stated him to be "a sound and able lawyer and a firm, true man", and they rejoiced that the Senate must either confirm him or leave the appointment to Polk; "and in either case the Democracy of the country now have a reasonable assurance that this fearful tribunal, the Federal Court, will be more in harmony than heretofore with the Democratic principles and doctrines of the apostle of republicanism." And James Buchanan wrote of Read that "there are few lawyers, if any, in Philadelphia his superior, a man of firmness, energy, and industry. . . . He holds a ready and powerful political pen and is a gentleman of the strictest honour and integrity." [1] The Senate, however, adjourned without acting on Read's nomination.

By a decision rendered at this 1844 Term, the future business of the Federal Courts was enormously augmented and the growth of corporations in the country was undoubtedly stimulated when the Court decided, in *Louisville etc. R. R.* v. *Letson*, 2 How. 497, that for the purposes of a suit in a Federal Court brought on the ground of diverse citizenship, a corporation was presumed to be a citizen of the State in which it was chartered. For over thirty-five years, the Federal Courts had held that they had no jurisdiction, on the ground of diverse citizenship, in a case in which a corporation was a party, unless all the individual stockholders were citizens of a State other than the State of the opposing party to the suit.[2]

[1] *John McLean Papers MSS; Willie P. Mangum Papers MSS*, letter of William G. Cochran to Mangum, Feb. 8, 1845; *New York Herald*, Feb. 8, 1845; *Boston Post*, Feb. 15, 1845; *Works of James Buchanan*, VI, letter to Gov. Shunk, Dec. 18, 1844. A letter to Judge McLean from B. W. Richards of Philadelphia, Feb. 10, 1845, termed Read a man of "great energy, very considerable talents, and irreproachable habits — a man of political zeal", who held Jacksonian beliefs but "whose political aspirations would terminate when he took a seat on the Bench."

[2] See *Strawbridge* v. *Curtiss*, 3 Cranch, 267, *Hope Ins. Co.* v. *Boardman*, 5 Cranch, 57, and *Bank of the United States* v. *Deveaux*, 5 Cranch, 61.

There had been strong protests made and good reasons advanced against this doctrine. Thus, John Quincy Adams, arguing in 1809, had well said that : "The reason of giving jurisdiction to the Courts of the United States in cases between citizens of different States, applies with the greatest force to the case of a powerful moneyed corporation erected within and under the laws of a particular State. If there was a probability that an individual citizen of a State could influence State Courts in his favor, how much stronger is the probability that they could be influenced in favor of a powerful moneyed institution which might be composed of the most influential characters in the State. What chance for justice could a plaintiff have against such a powerful association in the Courts of a small State whose Judges perhaps were annually elected, or held their office at the will of the Legislature ?" And Robert G. Harper had argued at the same time : "One great object in allowing citizens of different States to sue in the Federal Court was to obtain a uniformity of decision in cases of a commercial nature. The most numerous and important class of those cases, and the class in which it is most important to have uniform rules and principles, is that of insurance cases. They are almost wholly confined to corporations, though most frequently, in fact, between citizens of different States." Judge Wayne now, in deciding the *Letson Case*, said that the old cases had "never been satisfactory to the Bar" nor "entirely satisfactory to the Court that made them"; and he practically overruled them. Of this decision, Story wrote to Kent that he rejoiced that the Supreme Court " has at last come to the conclusion that a corporation is a citizen, an artificial citizen, I agree, but still a citizen. It gets rid of a great anomaly in our jurisprudence. This was always Judge Washington's opinion. I have held

the same opinion for very many years, and Mr. Chief Justice Marshall had, before his death, arrived at the conclusion, that our early decisions were wrong." [1] Though several later decisions of the Court firmly established this jurisdiction of the Federal Courts in corporation cases, there were strong dissenting opinions which met the approval of many persons who feared the establishment of any doctrine favorable to the corporations of the day, so rapidly growing in power and corrupt influence. This fear was expressed later by Judge Campbell: "Nor can we tell when the mischief will end. It may be safely assumed that no offering could be made to the wealthy, powerful and ambitious corporations of the populous and commercial States of the Union so valuable, and none which would so serve to enlarge the influence of those States, as the adoption, to its full import, of the conclusion, 'that to all intents and purposes, for the objects of their incorporation, these artificial persons are capable of being treated as a citizen as much as a natural person.' . . . The litigation before this Court, during this Term, suffices to disclose the complication, difficulty and danger of the controversies that must arise. . . . I am not willing to strengthen or to enlarge the connections between the Courts of the United States and these litigants." [2] On the other hand, as Judge Catron later pointed out: "If the United States Courts could be ousted of jurisdiction, and citizens of other States and subjects of foreign countries be forced into the State Courts, without the power of election, they would often be deprived, in great cases, of all benefit contemplated by the Constitution; and in

[1] *Story*, II, 469, letter of Aug. 31, 1844.

[2] Campbell, J., diss. in *Marshall* v. *B. & O. R. R.* (1853), 16 How. 314, 353; see also Daniel, J., diss. in *Rundle* v. *Delaware & Raritan Canal Co.* (1852), 14 How. 80, 95, and in *Northern Indiana R. R.* v. *Michigan Central R. R.* (1853), 15 How. 233, 249, and in *Marshall* v. *B. & O. R. R.* (1853), 16 How. 314, 339.

many cases, be compelled to submit their rights to Judges and juries who are inhabitants of the cities where the suit must be tried, and to contend with powerful corporations in local Courts, where the chances of impartial justice would be greatly against them, and where no prudent man would engage with such an antagonist, if he could help it." [1]

Fifty years after the *Letson Case*, Judge Taft (now Chief Justice of the Court) warmly defended the decision, on the ground that "the ruling was directly in the interest of the new States, who were thirsting for foreign capital, because it removed one of the hindrances to its coming. . . . While the provision of the Constitution was of course intended to avoid actual injustice from local prejudice, its more especial purpose was to allay the fears of such injustice in the minds of those whose material aid was necessary in developing the commercial intercourse between the States, and thus to induce such intercourse and the investment of capital owned in one State in another." [2] An opponent of the doctrine, on the other hand, pointed out that the decision was rendered at the beginning of the era of railroad building, "when public opinion ran strongly in favor of railroad enterprise", and that at that time, as most corporations were chartered by special acts, and as there was no such thing as a "tramp corporation", the evil possibilities in the doctrine were obscured. In view of the vast amount of litigation in modern times which would have been eliminated from the Federal Courts, and in view of the popular hostility towards them which has risen from the extensive resort to these Courts by cor-

[1] *Rundle* v. *Delaware & Raritan Canal Co.* (1852), 14 How. 80, 95; Taney, C. J., in *Covington Drawbridge Co.* v. *Shephard* (1857), 20 How. 227.

[2] *Criticism of the Federal Judiciary*, by William H. Taft, *Amer. Law Rev.* (1895), XXIX; *Federal Jurisdiction in Case of Corporations*, by Seymour D. Thompson, *ibid.*; see also *John Archibald Campbell* (1920), by Henry G. Connor, 30.

porations challenging the validity of State legislation, it may well be doubted whether the Court would not have acted more wisely, if it had adopted Judge Campbell's views.[1]

A second case at this 1844 Term, *Vidal et al.* v. *Philadelphia*, 2 How. 127, had an important connection with the history of the country and of the Court; for its argument by one of the counsel, Daniel Webster, was utilized as a factor in his campaign for the Presidency; the arguments of two of the other counsel, Horace Binney and John Sergeant, resulted in the offer to them by President Tyler of appointment on the Court; and owing to the very peculiar facts of the case, and to the extraordinarily vivid and picturesque description of the arguments by contemporary newspapers, few cases ever more keenly interested the general public or brought it more closely in contact with the Court. Under the will of Stephen Girard, a bequest of several million dollars had been left to the City of Philadelphia to found a College for the benefit of poor white orphans, but subject to the unusual condition that all ecclesiastics, missionaries and ministers of any sort were to be excluded from holding or exercising any station or duty in the College or even visiting the same. Three questions were presented in the case: whether a city was capable of acting as trustee of such a trust; whether the trust was too indefinite to be enforced in a Court of Chancery; and whether the trust by reason of its ex-

[1] Simeon E. Baldwin in *A Legal Fiction with its Wings Clipped*, *Amer. Law Rev.* (1907), XLI, said that legal fictions are of service "because they make bridges between several epochs, useful while travel goes that way, easily burned or shifted to new positions when it may be forwarded to some new goal." See also *Abrogation of Federal Jurisdiction Over State Corporations*, by Alfred W. Russell, *Harv. Law Rev.* (1893), VII, in which it was said "the welfare of the Federal Courts demands the non-existence of jurisdiction over State corporations." The first legislative recognition of Federal jurisdiction over corporations in suits based on diverse citizenship was in the Judiciary Act of March 3, 1887, which, for the first time, used the word "corporation."

clusion of ecclesiastics was contrary to public policy, as being opposed to the Christian religion. The case was argued for ten days; by Walter Jones on February 2, 3, 5, 1844; by Horace Binney, February 5, 6, 7, 8; by John Sergeant, February 8, 9; and by Daniel Webster (who had just resigned as Secretary of State under Tyler), February 10, 12, 13, — Jones and Webster undertaking the task of breaking down the will.[1] Of the opening arguments by Jones, an interesting description has been given by a prominent Member of Congress, who was present in the Court-room, Henry A. Wise of Virginia:[2]

In his quaint insinuating, lisping tones, he said: "Mr. Girard had devised more nourishment for the mind, without care of moral instruction, and the trustees had expended an immense sum in erecting a temple to the 'unknown God.' The testator had not meant to make the College religiously free, but to make it free of all religion. The orphans needed a fish, but they were given a serpent; bread, and they had gotten a stone!" All this was taken to be personal to Mr. Sergeant who was one of the chief counsellors of the city of Philadelphia in administering the charity; and the point of Mr. Jones was a poniard to him — the more so, because he had always admired and respected Mr. Jones as one of the first forensic men of his day. Jones did not seem to be conscious of where or whom his point touched, but whilst he was speaking in front of the Judge's seat, Mr. Sergeant was boiling with indignation and wrath in the Court lobby, and the moment Mr. Jones was done, he took him to the lobby and called him to severe account. Jones was astonished, disclaimed all personality, and calmly remonstrated against

[1] The *National Intelligencer*, Feb. 13, 1844, said: "The interest excited by the nature and magnitude of the great suit growing out of the will of the late Stephen Girard and the fame of the eminent counsel engaged in the cause — Messrs. Jones, Sergeant, Binney and Webster — have for some days past made the hall of the Supreme Court, the centre of attraction. On Saturday, and yesterday especially, the multitudes of both sexes which crowded into the hall and filled every nook of it, even with the sanction of the Bench itself, exceeded anything which we have for a long time seen in the way of packing a room."

[2] *Seven Decades of the Union* (1876), by Henry A. Wise; see also *Public Men and Events* (1875), by Nathan Sargent; *Life of Horace Binney* (1903), by Charles C. Binney, 215 *et seq.*

Mr. Sergeant's wrath; but the latter was not appeased, and it was feared that some one would have to interpose to prevent serious collision between these two, giants of intellect and champions of argument, but both small in stature. They were finally reconciled, however, though the one was sore under the figure of speech, and the other was sore from the scolding he got for it. . . . Again there was another scene — When Mr. Binney rose to deliver his argument, Mr. Webster having the conclusion, was obliged, by rule, to furnish him with all his points and all his authorities. This he did with great urbanity, just as Mr. Binney was about to open his address to the Court. . . . Mr. Binney had taken a moment to retire to the anteroom of the Court to adjust his personal attire and presence. He was particular about that, and came into the Court refreshed by water and smooth from the comb and brush. He was always very serene in his aspect, and without a forward look, expressed a composed self-reliance. He had just begun, when Mr. Webster rose and apologized for not having obeyed the rule before, and then cited his points and references. Mr. Binney paused to hear him, with his arms folded, and when he was done, smiled a sweet smile of indifference, and gently said, with a slight wave of his hand, that he "fully excused his brother for his delay of citation, for he would have no occasion to touch a single point or anything cited by him"; . . . Mr. Webster was taken back and staggered. Mr. Binney was no better lawyer than Mr. Sergeant, but was a far better speaker, and his style was as rich and pure as that of any other orator or writer of English in his days. . . . His forte was lucid order, perfectly expressed by the clearest logic and the richest but most chaste figure. Mr. Sergeant's forte was solid terseness, direct to the truth, but didactically dry. Neither was superior to Mr. Jones as a forensic debater.

The personalities, by-plays and clashes of counsel were most picturesquely described from day to day by the correspondents of the *New York Herald*:[1]

February 5: The highest judicial officers of the Nation, each robed in a black silk gown, and sitting in a large arm-

[1] *New York Herald*, Feb. 7, 8, 10, 12, 13, 14, 1844.

chair, before his separate table, Justice Story presiding, as Chief Justice Taney is confined to his room by sickness. In front, and some distance off, are four mahogany tables; seated at one of these is a small old gentleman, that is the celebrated Gen. Walter Jones; next is Daniel Webster with beetled brow and dark eyes, poring over the papers, books or printed statements of facts in the case; behind him sits John Calwalader, Esq., of Philadelphia and, in this cause, the principal grubber after facts and documents. He is Horace Binney's son-in-law. At the table parallel to Mr. Webster you behold Horace Binney, white hair, a large head and frame, wearing spectacles, and with strongly marked features. Next to him is John Sergeant. . . . Mr. Jones' argument, probably owing to his ill health, was a rather dull affair, and he spoke so low and with so much hesitancy as to keep the Court on nettles all the time. Mr. Binney appears to have a very ample brief, and to have every link in his chain of argument in its place. The best evidence of this is the fact that Webster and the Judges are kept busy with their pens, noting his points and positions. The argument is very close, searching and logical; and every now and then Webster stops, takes a long breath and goes at his pen again. Daniel evidently has woke up, he is not taking up notes for nothing. . . . It is going to be a tall fight and no mistake, and as the clear voice of the speaker sounds through the arches, you can see the people stretching their necks round the pillars and over the screens, wondering at the transition from Gen. Jones' soporifics. Tomorrow the grand fight begins, and I have no doubt the cars will bring a fresh stock of lawyers.

February 6: The Court-room was densely crowded this morning with ladies and gentlemen at a very early hour. Distinguished members of the legal profession were in diligent and earnest attendance from every part of the United States, intently eager to hear the arguments of these mighty and gigantic intellects. . . . Mr. Webster evidently enjoys his opponent's argument very much, although now and then I think Mr. Binney took the Court and the rest of the counsel into deeper waters than they commonly swim in. . . . Mr. Binney is a pleasant speaker, with a good voice, and evidently a belles lettres scholar. . . . Today in quoting

from one of Mr. Webster's own arguments in 13 Peters, he begged him to answer his own authorities. Webster answered: "That was a *bad* case and I had to make my arguments to suit my case." This raised quite a laugh. Throughout the Court-room there is a great silence, save now and then when a bevy of ladies come in. In fact, it looks more like a ballroom sometimes; and if old Lord Eldon and the defunct Judges of Westminster would walk in from their graves, each particular whalebone in their wigs would stand on end at this mixture of men and women, law and politeness, ogling and flirtation, bowing and curtesying, going on in the highest tribunal in America.

February 7: Mr. Binney is still evolving his mighty argument; Mr. Webster looks on with undisguised dismay. It seems he has hitherto regarded the moderate sized octavo brief, which Mr. Binney has been using, as the mighty engine with which he had to contend. But the direful fact has been revealed today that it is but one of seven thunders, and that there are six more yet to come. The Court was astounded at the discovery. There is but one opinion among all those who have listened to this masterly argument; that it has been like a huge screw, slowly turning round on its threads. . . . It has pulverized Mr. Jones' argument. . . . It remains to be seen what Mr. Webster will do; that he will be more powerful as a speaker and more effective with his audience is very probable; but that he can pull Mr. Binney's argument to pieces and build up a better one in its place may well be doubted.

February 10: Daniel Webster is speaking. . . . There is a tremendous squeeze, you can scarcely get a case knife in edgeways. . . . Hundreds and hundreds went away, unable to obtain admittance. There never were so many persons in the Court-room since it was built. Over 200 ladies were there; crowded, squeezed and almost jammed in that little room; in front of the Judges and behind the Judges; in front of Mr. Webster and behind him and on each side of him were rows and rows of beautiful women dressed "to the highest." Senators, Members of the House, Whigs and Locos, foreign Ministers, Cabinet officers, old and young — all kinds of people were there. Both the President's sons, with a cluster of handsome girls, were present. John Quincy Adams sat

through the whole of it, listening attentively to every word. Mr. Crittenden sat on Webster's left side, and Ho ace Binney on his right. The body of the room, the sides, the aisles, the entrances, all were blocked up with people. And it was curious to see on the bench a row of beautiful women, seated and filling up the spaces between the chairs of the Judges, so as to look like a second and a female Bench of beautiful Judges.[1]

February 13: All of the seats of the members of the Bar and half the area behind the Judges were occupied. The audience trespassed hard upon the Judge once. But few persons of the great multitude who desired to be present could get within hearing distance. The opening of the argument was remarkable for all the impressiveness of manner, clearness of expression and power of analysis for which Mr. Webster is so distinguished. The closing part of his address for the day produced a thrilling effect upon those who heard him, and many at times were shedding tears, from his eloquent defence of the power and influences of the Christian religion. The Court adjourned at three o'clock. Mr. Webster finished his argument nobly. Some evil minded persons, as I have no doubt they might be proved to be, have delicately insinuated that Mr. Webster made rather a failure. If it were a failure, they say it must have been either because he was on the wrong side of the case, or else because he had not allowed himself sufficient time to prepare his brief. Others think that Mr. Binney's arguments were so double-and-twisted and tied-up together that Mr. Webster was somewhat bothered to disentangle and tear them to pieces.

" The curious part of the case is that the whole discussion has assumed a semi-theological character," wrote Judge Story to his wife. "Mr. Girard excluded ministers of all sects from being admitted into his college as instructors or visitors; but he required the scholars to be taught the love of truth, morality, and benevolence

[1] Judge Story wrote to his wife, Feb. 10: "The Court room was crowded to suffocation, with ladies and gentlemen to hear him. Even the space behind the Judges, close home to their chairs . . . all presented a dense mass of listeners." *Story*, II, 467.

to their fellow-men. Mr. Jones and Mr. Webster contended that these restrictions were anti-Christian, and illegal, Mr. Binney and Mr. Sergeant contended that they were valid, and Christian, founded upon the great difficulty of making ministers cease to be controversialists, and forbearing to teach the doctrines of their sect. I was not a little amused with the manner in which, on each side, the language of the Scriptures and the doctrines of Christianity were brought in to point the argument; and to find the Court engaged in hearing homilies of faith and exposition of Christianity, with almost the formality of lectures from the pulpit." "To escape an hour or two of soporifics," wrote Adams in his diary, "left the Hall (of Representatives) and went into that where the Supreme Court were in session to see what had become of Stephen Girard's will, and the scramble of lawyers and collaterals for the fragments of his colossal and misshapen endowment of an infidel charity school for orphan boys. Webster had just before closed his argument, for which, it is said, if he succeeds, he is to have fifty thousand dollars for his share of the plunder." [1] And another Member of Congress, John Wentworth of Illinois, wrote regarding the remarkable effect of Webster's argument upon his auditors: "One day, a member came into the House and exclaimed that 'Preaching was played out. There was no use for ministers now. Daniel Webster is down in the Supreme Court-room, eclipsing them all by a defense of the Christian religion. Hereafter we are to have the Gospel according to Webster.' . . . As I entered the Court-room, here are his first words: 'And these words which I command thee this day, shall be in thy heart.'. . . Then again: 'Suffer little *children* to come unto me',

[1] *J. Q. Adams*, XI, entries of Feb. 9, 10, 13, 1844; *Congressional Reminiscences* (1882), by John Wentworth, 36.

accenting the word, children. He repeated it, accenting the word, little. Then rolling his eyes heavenward and extending his arm, he repeated it thus: 'Suffer little children to come unto *Me*, unto *Me*, unto *Me*, suffer little children to come.' So he went on for three days. And it was the only three days' meeting that I ever attended where one man did all the preaching, and there was neither praying nor singing. I have heard such stalwarts in the American pulpit as Lyman Beecher, Robert J. Breckinridge, Hosea Ballou, William Ellery Channing, and Alexander Campbell, but Webster overshadowed them all in his commendation of doctrines which they held in common. One could best be reminded of Paul at Mars Hill. . . . There was the closest attention and the most profound silence except when, assuming an air of indignation with all the force with which he was capable, he exclaimed: 'To even argue upon the merits of such a will is an insult to the understanding of every man. It opposes all that is in heaven and all on earth that is worth being on earth.' Here the audience, with one accord, broke out in the most enthusiastic applause. This is the only time that I ever heard applause in the Supreme Court-room. The first day, I easily obtained a seat. With difficulty, the next. But on the third, I scarcely found standing room." How widespread was the interest of the public in Webster's argument was illustrated by an editorial remark of the *New York Herald*, which was opposed to Webster, but stated that the demand for its paper, "yesterday among all the religious circles of the city was truly extraordinary. Parsons, clergymen, saints, the elect of all sects, including sinners, seemed to make a general rush for the only paper that contained the wonderful argument of that wonderful man." That Webster, in making his eloquent plea in behalf of the